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Supreme Court, U.S.
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CLERK

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1987

No. _____

In Re: COLONIAL DISCOUNT CORPORATION,

*Debtor,*

OCTOPI, INC. and JOE McNEAL,

*Petitioners*

v.

JAMES C. COURTNEY,

*Respondents.*

## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

SIDNEY MISHKIN
Mishkin, Cromer, Eaglesfield & Maher
525 Station Place
200 South Meridian Street
Indianapolis, Indiana 46225
Telephone: (317) 634-9100

Central Publishing Company, Inc., Indianapolis, IN 46206

## QUESTIONS PRESENTED

1. Whether the United States Court of Appeals for the Seventh Circuit erred in affirming summary judgment against appellants in contravention of legal principles established by this Court and based upon an erroneous application of *Anderson v. Liberty Lobby, Inc.*, 106 S. Ct. 2523 (1986).

2. Whether the United States Court of Appeals for the Seventh Circuit erred in its ruling that the evidence presented by appellants raised no genuine issue of material fact and, in the alternative, that such evidence was not admissable at trial based upon an erroneous application of *Anderson v. Liberty Lobby, Inc.*, 106 S. Ct. 2523 (1986).

## PARTIES TO THE PROCEEDING

This action arose in a bankruptcy action. The debtor is Colonial Discount Corporation. The Plaintiff-appelle is James C. Courtney, trustee. The defendants-appellants are Octopi, Inc. and Joe McNeal.

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v.

JAMES C. COURTNEY,

*Respondents.*

## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

The petitioners Octopi, Inc. and Joe McNeal respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Seventh Circuit entered in this proceeding on December 5, 1986.

## THE OPINIONS BELOW

The opinions of the Bankruptcy Court and the District Court have not been officially reported. The Bankruptcy Court heard oral argument on October 7, 1984 and rendered its *Findings of Fact and Conclusions of Law and Entry on Complaint to Avoid Preferential Transfer* on February 5, 1985. This entry of the Bankruptcy Court granted summary judgment for the

trustee and avoided the mortgage, which is the subject of this law suit, from the debtor to Octopi.

On June 26, 1985, the District Court entered its *Memorandum of Decision* affirming the judgment of the Bankruptcy Court.

The Seventh Circuit Court of Appeals on December 5, 1986 issued its opinion affirming the summary judgment for the trustee which avoided the mortgage in question. Copies of the Bankruptcy Court's Findings and Conclusions, District Court's and Court of Appeal's opinions are attached hereto at pages A-1 and A-6 and A-13 respectively.

## JURISDICTION

The date of the judgment of the Seventh Circuit Court of Appeals sought to be reviewed herein was entered on December 5, 1986 and there was no order or request respecting a rehearing. The jurisdiction of this Court is invoked pursuant to 20 U.S.C. §1254(1).

## STATUTORY PROVISIONS INVOLVED

Section 547(b) of the Bankruptcy Code [11 U.S.C. 547(b)] sets forth the rules governing avoidability of preferential transfers. Under Subsection (b), the trustee may avoid any transfer of property of the debtor that is:

(1) To or for the benefit of a creditor;

(2) For or on account of an antecedent debt owed by a debtor before such transfer was made;

(3) Made while the debtor was insolvent;

(4) Made —

(A) On or within ninety days before the date of the filing of the petition; or,

(B) Between ninety days and one year before the date of the filing of the petition if such creditor at the time of such transfer was an insider;

(5) That enable such creditor to receive more than such creditor would receive if —

(A) The case were a case under Chapter 7 of this title;

(B) The transfer had not been made; and,

(C) Such creditor received payment of such debt to the extent provided by the provisions of this title.

Section 547(g) of the Bankruptcy Code [11 U.S.C. 547(g)] provides:

"(g) For the purposes of this Section, the trustee has the burden of providing the avoidability of a transfer under Subsection (b) of this Section, and the creditor or party in interest against whom recovery or avoidance is sought has the burden of proving the nonavoidability of a transfer under Subsection (c) of this Section.

Section 547(f) of the Bankruptcy Code [11 U.S.C. 547(f)] provides:

"(f) For the purposes of this Section, the debtor is presumed to have been insolvent on and during the 90 days immediately preceding the date of the filing of the petition."

Rule 401 of Federal Rules of Evidence provides:

" 'Relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence."

The relevant portions of Trial Rule 56 of the Federal Rules of Civil Procedure are as follows:

"(c) Motion and Proceedings Thereon. The motion shall be served at least 10 days before the time fixed for the hearing. The adverse party prior to the day of hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving

party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages."

* * *

"(e) Form of Affidavits; Further Testimony; Defense Required. Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories, or further affidavits. When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleadings, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him."

## STATEMENT OF THE CASE

This petition arises from an opinion issued by the Seventh Circuit Court of Appeals on December 5, 1986. A copy of this opinion is included in the Appendix attached hereto.

On February 4, 1982 Colonial Discount Corporation ("CDC"), the debtor in a bankruptcy action, filed for reorganization under Chapter 11 of the Bankruptcy Code. Prior to filing its Chapter 11 petition, CDC was engaged in the business of buying and selling real estate. At the time of filing, CDC's estate consisted of hundreds of separate real estate parcels.

On October 23, 1981, CDC borrowed $150,000 from a lender known as Silvertown, Inc. In return, CDC gave Silvertown a promissory note and a mortgage. The mortgage was never

recorded. In exchange for Joe McNeal's agreement to act as surety on the loan, Silvertown assigned the promissory note and mortgage to him.

On November 13, 1981, CDC made a payment of $50,000 on the loan to McNeal, who in turn forwarded it to Silvertown. At this time, the due date of the note was extended from November 15, 1981 to December 7, 1981. When December 7 arrived, CDC failed to make payment and McNeal as surety paid Silvertown the balance of $102,560.

On January 13, 1982, Joe McNeal incorporated Octopi, Inc. with himself as president and sole shareholder. The same day, CDC granted a mortgage to Octopi on a parcel of real estate it owned for the purpose of securing the debt it owed to McNeal. This mortgage was recorded on January 14, 1982.

The trustee brought this action in the Bankruptcy Court. He alleged that the Octopi mortgage on the real estate was voidable as a preferential transfer under 11 U.S.C. 547(b).

In the Bankruptcy Code, the trustee moved for summary judgment. In his affidavit, the trustee stated:

> "The Debtor's financial condition did not significantly deteriorate between October 1, 1981 and the filing of the Chapter 11 petition February 4, 1982. The Debtor was insolvent on October 1, 1981 and at all times thereafter."

The Bankruptcy Court granted summary judgment voiding the mortgage. The District Court affirmed the Bankruptcy Court's decision. The Seventh Circuit affirmed.

McNeal and Octopi have contended throughout these proceedings that a genuine issue of material fact exists as to whether CDC was insolvent. They have specifically relied upon CDC's financial report for the year ending September, 1980 which contained current value balance sheets. These balance sheets revealed a positive net worth of over five million dollars. This financial report for 1980 was completed on September 22, 1981. The auditors noted in their 1980 report that litigation was filed against CDC on September 14, 1981.

While the financial report noted that the current-value accounting criteria "differ significantly from, and are not in accordance with, generally accepted accounting principles", the auditors observed:

> "Because current-value accounting is presently in an experimental stage, uniform criteria for the preparation and presentation of current-value financial information has not yet been established and acceptable alternatives exist as to the nature and content; accordingly, as experimentation proceeds, the principles followed in the accompanying current-financial statements may be modified."

The Seventh Circuit erroneously held that the current-value balance sheets for 1980 would not have been admissable at trial and could, therefore, not properly be considered on a motion for summary judgment. The Court further concluded that based upon an erroneous reading of *Anderson v. Liberty Lobby, Inc.*, *supra.*, that the current value balance sheets raised no genuine issue in any event "since no reasonable factfinder could rest a verdict in favor of McNeal and Octopi on them".

## REASONS FOR ALLOWANCE OF THE WRIT

### A. Summary Judgment Is Improper Where Relevant Reasonable Inferences Of Solvency May Be Drawn From The Record

In this case the Seventh Circuit failed to apply established principles governing summary judgment as established by this Court. To reach its conclusions, the Seventh Circuit had to decide by inference that the current-value accounting method was an invalid method of valuing the assets of CDC. In addition, the court fell back upon the position that even if the current-value balance method was valid, it could be disregarded from consideration as being irrelevant as of the time of the mortgage transfer in January, 1982.

Summary judgment is an extreme remedy which ends the matter at issue, thereby foreclosing any subsequent oppor-

tunity to obtain live testimony to support reasonable inferences that might be drawn from documents and affidavits before the court. Consequently, in ruling on a motion for summary judgment the facts before the court must be viewed in the light most favorable to the party opposing the motion and that party given the benefit of all reasonable inferences to be drawn from the evidence. *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 153-159, 90 S.Ct. 1598,26 L.Ed. 142 (1970). Where a choice of reasonable inferences may be drawn from the underlying facts contained in such affidavits and attached exhibits, the court must draw those inferences most favorable to the party opposing the motion. *United States v. Diebold*, 369 U.S. 654, 82 S.Ct. 993, 8 L.Ed. 2d 176 (1962). When there is a dispute over the inferences which might reasonably be drawn from such facts and these inferences might affect the outcome of the litigation, then summary judgment is improper. *Anderson v. Liberty Lobby Inc.*, 106 S.Ct. 2505, 2510 (1986). In this case the granting of summary judgment was in error as there are reasonable inferences which may be drawn from the underlying facts on the record which rebut the presumption of CDC's insolvency on the date of the mortgage transfer.

## B. The Relevance and Admissibility of the 1980 Financial Statement

Applying the reasonable inference that CDC's assets as of September 30, 1980 exceeded its liabilities by $5,000,000, a reasonable fact finder could conclude that as of January 14, 1982 CDC was solvent. This conclusion can be reached from the following facts:

A) CDC's net worth was over $5 million on September 30, 1980 under principles of current value accounting.

B) Between September 30, 1980 and October, 1981 there was no massive depreciation of the real estate market;

C) The September 30, 1980 audit was not completed until September 22, 1981. At that time, the auditors added a note to the audit that the Indiana Securities

Commission had filed a lawsuit against CDC on September 14, 1981. A reasonable inference arises from this that if any drastic reduction of the previously reported $5 million net worth had occurred the auditor would have also reported this in September of 1981;

D) Absent any statement by the auditors in September, 1981 of a drastic reduction of CDC's net worth, it is reasonable to infer that there had been no such reduction;

E) The trustee's affidavit stated, based upon his personal knowledge of CDC's books and records, "the Debtor's financial condition did not significantly deteriorate between October 1, 1981 and the filing of the Chapter 11 petition on February 4, 1982." Therefore, it is reasonable to infer that no drastic reduction had occurred between September 1981 and the date of the mortgage transfer and that CDC was solvent on that latter date.

There can be no question that the financial condition of a debtor during the time when a transfer occurs is relevant to the issue of solvency. Where a financial statement can fairly be inferred to cover such a period, it is most material and relevant upon the question of solvency or insolvency. *See Manly v. Southern Supply Co.*, 14 F. 2d 273 (4 Cir. 1926). The fact that there was a lapse of time between the initial preparation of the balance sheets and the mortgage transaction involved herein only goes to the weight, not the admissability of the evidence. *United States v. Taylor*, 562 F. 2d 572 (8th Cir. 1977) *Cert. denied*, 434 U.S. 988, 98 S. Ct. 620, 54 L.Ed. 484 (1977) citing rule 401 of the Federal Rules of evidence.

## C. The Validity of the Current Value Method of Accounting

The facts on the record disclose the CDC was a company that owned large tracts of real estate. This real estate was purchased in tracts in contemplation that the tracts would be developed, subdivided and sold. It is a reasonable inference

that in most cases real estate appreciates. The current value method of accounting assesses the value of real estate in its then condition. The more conservative cost basis of accounting assesses the value based upon the purchase price of the real estate and actual costs of development.

A rational fact finder could find that the current value method was a reasonable way to value CDC's assets. Certainly the current fair market value of property is a better measure of its worth than the initial cost and the development cost of the property. The rejection of this basis of accounting by the Seventh Circuit appears to be based upon the statements by the auditors that the current value accounting was in an "experimental" stage because final uniform criteria for the preparation of current valuation had not been established and that acceptable alternatives existed as to the nature and content of presenting such information. This is hardly a statement or disclaimer by the auditors that their work was erroneous or invalid. The fact that the auditors prepared and signed the balance sheet gives rise to an inference of validity, at least for the purposes of a ruling on a motion for summary judgment. The drawing of an inference of invalidity by a fact finder, based upon nothing else in the record, is contrary to the decisions of this Court cited above. Summary judgment should have been denied, and the auditors allowed to testify as to the validity of their current value method of valuing CDC's assets.

## CONCLUSION

The above discussed facts and the reasonable inferences that can be drawn from them show that a reasonable factfinder could find for appellants on the issue of CDC's solvency. The materials before the lower courts have thus raised a genuine issue as to the material fact of the solvency of CDC at the time of the mortgage transfer. The lower courts however, instead of drawing these reasonable inferences in Octopi and McNeal's favor, erroneously weighed the evidence against them, disregarded reasonable inferences on their behalf and determined

the truth of the matter in favor of the trustee. It was, therefore, improper for the lower courts to decide the issue of solvency on a motion for summary judgment. *United States v. Diebold Supra.* 369 U.S. at 655; and *Anderson v. Liberty Lobby, Inc.*, 106 S. Ct. 2505, 2511, 2513 (1986). Unless this case is remanded to the bankruptcy court, Octopi and McNeal will not be able to flesh out the reasonable inferences stated herein in order to have their due process opportunity to convince the factfinder of the merits of their case. Octopi and McNeal respectfully urge this Court to issue the Writ of Certiorari prayed for herein.

Respectfully submitted,

_____

Sidney Mishkin
Attorney for Petitioners

MISHKIN, CROMER, EAGLESFIELD & MAHER
525 Station Place
200 South Meridian Street
Indianapolis, Indiana 46225
(317) 634-9100

# APPENDIX

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UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

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| IN RE: | ) | |
| | ) | |
| COLONIAL DISCOUNT CORPORATION, | ) | BANKRUPTCY NO. IP82-384RAV |
| | ) | |
| *Debtor.* | ) | |
| | ) | |
| JAMES C. COURTNEY, TRUSTEE, *Plaintiff,* | ) | ADVERSARY NO. 84-31 |
| | ) | |
| v. | ) | |
| | ) | |
| OCTOPI, INC. and JOE W. McNEAL, | ) | |
| | ) | |
| *Defendants.* | ) | |

## FINDINGS OF FACT AND CONCLUSIONS OF LAW AND ENTRY ON COMPLAINT TO AVOID PREFERENTIAL TRANSFERS

This cause came before the Court upon Plaintiff's Motion For Summary Judgment filed pursuant to Bankruptcy Rule 7056 and Federal Rule of Civil Procedure 56. The Motion having been fully briefed, and the Court having examined the pleadings and affidavits, and upon consideration of arguments of counsel, now enters its Findings of Fact and Conclusions of Law as hereinafter stated.

## FINDINGS OF FACT

1. On February 4, 1982, Colonial Discount Corporation ("Debtor") filed a petition for relief under Chapter 11 of the Bankruptcy Code.

2. On February 10, 1982, James C. Courtney was appointed Trustee for the above-named Debtor, and has been acting in such capacity since said date.

3. On or about October 23, 1981, the Debtor borrowed the sum of $150,000.00 from Silvertown, Inc., and/or Leon E. Hendrickson d/b/a Silvertown.

4. In order to secure said loan, the Debtor granted to Silvertown, Inc. a real estate mortgage on the property at 40-42 Virginia Avenue.

5. Said real estate mortgage was never recorded.

6. On or about October 23, 1981, Leon E. Hendrickson d/b/a Silvertown assigned the Debtor's note and unrecorded mortgage to Joseph W. McNeal, and altered the note to indicate the assigned note's due date was November 15, 1981.

7. On November 13, 1981, as partial payment on the original $150,000.00 obligation, the Debtor paid to Joe McNeal the sum of $50,000.00.

8. The Defendant, Octopi, Inc., was incorporated on January 13, 1982.

9. On or about January 13, 1982, the Debtor agreed to pay to Octopi, Inc. the sum of $110,000.00 representing the principal and interest due on the original $150,000.00 loan.

10. On January 14, 1982, the Debtor executed a real estate mortgage in favor of Octopi, Inc. granting to Octopi, Inc. a mortgage on the property at 40-42 Virginia Avenue. Said real estate mortgage was recorded on January 14, 1982, in the office of the Marion County Recorder as Instrument No. 82-02575.

11. The estate herein consisted of hundreds and hundreds of separate parcels of real estate. The Trustee did not investigate, or cause to be investigated, the validity or non-validity of liens on the various parcels of real estate until such time as those parcels were in the process of being sold or abandoned to secured creditors. With respect to the property at 40-42 Virginia Avenue, neither Octopi, Inc. nor Joe McNeal made any

effort to enforce their alleged lien, nor did they request or receive any payments from the estate with regard to the underlying obligation. The Trustee first learned of the transactions set forth in the preceding paragraphs in September, 1983, when Joe McNeal offered to purchase the property at 40-42 Virginia Avenue. As soon as the Trustee learned of the facts herein, Trustee's counsel advised McNeal's counsel of the Trustee's position.

12. On October 30, 1983, the Trustee filed with the Investors' Committee a joint Plan of Reorganization and Disclosure Statement. The Plan was confirmed on January 16, 1984. Based upon all the available evidence, the maximum dividend for general unsecured creditors whose claims total in excess of $10,000,000.00 will be less than 15 percent.

13. Subsequent to October 1, 1981, the Debtor did not incur any significant additional indebtedness. The Debtors financial condition did not significantly deteriorate between October 1, 1981 and the filing of the Chapter 11 petition on February 4, 1982. The Debtor was insolvent on October 1, 1981 and at all times thereafter.

14. There are no genuine issues as to any material fact concerning Court I of Plaintiff's Complaint.

## CONCLUSIONS OF LAW

1. The Court has jurisdiction over the parties and subject matter of this action.

2. The law is with the Plaintiff and against the Defendants as to Count I of the Complaint.

3. The Plaintiffs Motion For Summary Judgment, as to both Counts I of the Complaint, should be sustained.

4. With regard to Count I, the Plaintiff has sustained his burden of proving that the mortgage in favor of Octopi, Inc. on the property at 40-42 Virginia Avenue, recorded on January 14, 1982, constitutes a preferential transfer under 11 U.S.C. Sec-

tion 547(b). In particular the Court finds that the Plaintiff has demonstrated the following:

a. The property transferred was property of the Debtor;
b. Octopi, Inc. is a creditor of the Debtor;
c. The Transfer was for or on account of antecedent debt owed by the Debtor before such payments were made originally to Leon E. Hendrickson d/b/a Silvertown and/or Silvertown, Inc. subsequently assigned to Joe W. McNeal and then assigned to Octopi, Inc.;
d. The transfer was made while the Debtor was insolvent. 11 U.S.C. Section 547(f).
e. The transfer was made within 90 days preceding the filing of the Chapter 11 petition by the Debtor; and
f. The transfer enables Octopi, Inc. to receive more than it would receive in a Chapter 7 liquidation.

5. Octopi, Inc. has not sustained its burden of establishing any of the exceptions to avoidance set forth in 11 U.S.C. section 547(c).

6. The Plaintiff is not estopped from asserting the preferential nature and resulting invalidity of the mortgage.

7. With regard to Count II, the Plaintiff has not sustained his burden of proving that the payments to Joe McNeal totalling $50,000.00 constitute a preferential transfer under 11 U.S.C. Section 547(b). In particular, the Court finds that the Plaintiff has demonstrated that the exception of 11 U.S.C. 547(c)(2) apply since in assigning the note the principals agreed to a "due date" and the partial payment complained of occurred prior to said date, accordingly the payment was in "ordinary course" and made according to ordinary business terms.

8. Joe McNeal has sustained his burden of establishing an exception to avoidance set forth in 11 U.S.C. Section 547(c).

9. Plaintiff is entitled to judgment against Octopi, Inc. declaring the mortgage on the property at 40-42 Virginia Avenue recorded on January 14, 1982 avoided.

## JUDGMENT

On the basis of the foregoing findings of fact and conclusions of law, it is

ORDERED, ADJUDGED AND DECREED that the mortgage in favor of Octopi, Inc. on the property at 40-42 Virginia Avenue, recorded on January 14, 1982, constitutes a preferential transfer pursuant to 11 U.S.C. Section 547(b) and is therefore avoided, and it is further

ORDERED, ADJUDGED AND DECREED that Joe McNeal, principal of Octopi, Inc., be, and he hereby is, ordered and directed to prepare and deliver to the Plaintiff, within 15 days from the date hereof, a mortgage release in properly recordable form, and it is further

ORDERED, ADJUDGED AND DECREED that if Joe McNeal does not comply with the preceding paragraph, the Plaintiff be, and he hereby is, authorized to prepare and file a mortgage release.

DATED at Indianapolis, Indiana this 5th day of February, 1985.

/s/ RICHARD W. VANDIVIER

RICHARD W. VANDIVIER
U.S. Bankruptcy Judge

DISTRIBUTION:

Jon B. Abels
DANN PECAR NEWMAN TALESNICK & KLEIMAN
1600 Market Square Center
P.O. Box 44109
Indianapolis, IN 46204

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
INDIANAPOLIS DIVISION

| | | |
|---|---|---|
| IN RE: | ) | |
| | ) | |
| OCTOPI, INC. and | ) | District Court |
| JOE McNEAL, | ) | Cause No. |
| | ) | IP 85-447-C |
| *Appellants and* | ) | |
| *Cross-Appellees,* | ) | |
| | ) | |
| JAMES C. COURTNEY, TRUSTEE, | ) | |
| | ) | |
| *Appellee and* | ) | |
| *Cross-Appellant,* | ) | Bankruptcy |
| | ) | Court |
| | ) | Cause No. |
| IN RE: | ) | IP 82-384 RAV |
| | ) | |
| COLONIAL DISCOUNT CORPORATION, | ) | |
| | ) | |
| *Debtor.* | ) | |
| | ) | Adversary |
| JAMES COURTNEY, TRUSTEE, | ) | Proceeding |
| | ) | No. AP 84-31 |
| *Plaintiff,* | ) | |
| | ) | |
| -vs- | ) | |
| | ) | |
| OCTOPI, INC. and | ) | |
| JOE W. McNEAL, | ) | |
| | ) | |
| *Defendants.* | ) | |

**MEMORANDUM OF DECISION**

This case is before the Court on cross-appeals from the entry of judgment by the United States Bankruptcy Court for the

Southern District of Indiana. For the following reasons, the judgment of the Bankruptcy Court will be affirmed.

## Background

Colonial Discount Corporation (CDC), the debtor in this bankruptcy action, filed for bankruptcy under Chapter 11 of the Bankruptcy Code on February 4, 1982. CDC was involved in the business of buying and selling real estate.

On October 23, 1981, CDC borrowed $150,000.00 from Silvertown, Inc., or Leon Hendrickson d/b/a Silvertown. To secure this loan, CDC granted real estate mortgages to Silvertown on properties located at 40-42 Virginia Avenue, Indianapolis, Indiana, and Westman Glen Apartments in Hamilton County, Indiana. These mortgages, however, were never recorded. Additionally, Hendrickson required Joseph McNeal, who had assisted CDC in obtaining the loan from Hendrickson, to act as surety on the loan. Pursuant thereto, Silvertown assigned CDC's note and the mortgages to McNeal. The note's due date was November 15, 1981.

Before agreeing to act as surety, McNeal reviewed CDC's most recent financial statement for the year ending September, 1980. Although the statement contained caveats added September 14, 1981 regarding the possible effect of litigation commenced against CDC in September, 1981, the statement showed CDC as having a positive net worth for the period covered. The statement revealed that the balance sheets for the years 1980 and 1979 were prepared in accordance with generally accepted accounting principles but that the current value balance sheets, showing a greater net worth, were prepared under an experimental method and *not* according to generally accepted accounting principles.

CDC made a partial payment of $50,000.00 on the loan on November 13, 1981 to McNeal who in turn paid Hendrickson. The term of the note was then extended to December 7, 1981. On December 7, 1981 CDC failed to pay the balance on the loan and McNeal, as surety, then paid the balance of $102,560.00.

Octopi, Inc., with McNeal as its sole shareholder and president, was incorporated on January 13, 1982. On January 14, 1982, CDC executed a demand note in favor of Octopi in the sum of $110,000.00 representing the principal and interest due on the original $150,000.00 loan. CDC also executed new mortgages on the Virginia Avenue property and Westman Glen Apartments property. These mortgages were recorded on the same date. McNeal asserts that at this time he advanced an additional $7,000.00 to CDC but no objective evidence has been submitted to substantiate this claim and CDC's books and records do not reveal the receipt of any such amount.

CDC then filed for bankruptcy on February 4, 1982. James Courtney was appointed Trustee. The Trustee proceeded to liquidate or abandon certain assets of CDC including the Westman Glen Apartments. Following an unsuccessful auction, at which the highest bid was rejected, the Trustee abandoned the apartments property to the senior mortgage holder, who then proceeded to foreclose on the property. Thereafter, on April 7, 1983, McNeal sought to obtain a quitclaim deed from the Trustee for the apartments property. The parties agreed that the Trustee would execute a quitclaim deed in exchange for $10,000.00 and a credit of $25,000.00 on CDC's indebtedness on the Virginia Avenue property. The apartments property was sold at a foreclosure sale on April 11, 1983.

In September, 1983, McNeal offered to purchase the Virginia Avenue property from the Trustee. At this time, the Trustee learned of the transactions leading up to and including the execution of the mortgage on the Virginia Avenue property in favor of Octopi. The Trustee's counsel promptly advised McNeal's counsel of the Trustee's position that the January 14, 1982 mortgage in favor of Octopi and the earlier $50,000.00 payment to McNeal on the original indebtedness constituted improper preferential transfers. The Trustee then initiated the present adversary proceedings to set aside the Octopi mortgage and recover the $50,000.00 payment.

On plaintiff's motion for summary judgment, the Bankruptcy Court found that the Octopi mortgage constituted a

preference under 11 U.S.C. §547(b) and was therefore avoided. The Bankruptcy Court further found that the November 13, 1981 payment of $50,000.00 on the original indebtedness was done in the ordinary course of business and was therefore not a preference pursuant to 11 U.S.C. §547(c).

McNeal and Octopi as appellants and the Trustee as cross-appellant have appealed the Bankruptcy Court's decision to the extent it was adverse to their positions.

**Discussion**

In reviewing the decision of the Bankruptcy Court, this Court must accept the Bankruptcy Court's findings of fact unless they are clearly erroneous. This standard, however, does not apply to this Court's review of the Bankruptcy Court's conclusions of law. *In re Kimzey*, No. 84-1050 (7th Cir. May 6, 1985), Slip O. at 3; *Matter of Evanston Motor Co., Inc.*, 735 F.2d 1029, 1031 (7th Cir. 1984).

Section 547(b) provides that the Trustee in bankruptcy may avoid any transfer of property of the debtor which is a preference. 11 U.S.C. §547(b). A transfer is deemed to be preferential if the following requirements are met: (1) the property was transferred to or for the benefit of a creditor; (2) the property was transferred for or on account of an antecedent debt owed by the debtor before such transfer was made, (3) the transfer was made while the debtor was insolvent, (4) the transfer was made on or within 90 days before the date of the filing of the bankruptcy petition or within one year if the creditor was an insider and had reasonable cause to believe the debtor was involvent at the time of the transfer, and (5) the transfer enables the creditor to receive more than he would receive either under Chapter 7 of the Bankruptcy Code, if the transfer had not been made, or if the creditor were paid to the extent provided under Title 11, U.S.C.

The appellants, McNeal and Octopi, contend that certain factual issues exist which were improperly resolved by the Bankruptcy Court in its granting of summary judgment. First appellants assert that a question of fact exists regarding CDC's

insolvency within the 90 days preceding the filing of the bankruptcy petition. A debtor is presumed to be insolvent during the 90 days leading up to the filing of the bankruptcy petition. 11 U.S.C. §547(f). To rebut this presumption, the appellants argue that the 1980 financial statement contained information as late as September 14, 1981 and that McNeal discussed the financial statement with CDC's sole shareholder, Jack Griffin. The inclusion of caveats regarding certain litigation does not change the character of the financial statement which reflects, according to sound accounting principles, CDC's financial posture as of September, 1980. The appellants failed to raise a factual issue regarding CDC's insolvency in October 1981 or on January 14, 1982, the date of the asserted preferential transfer. CDC incurred no significant additional indebtedness during the 90 day period before the filing of the petition. The Bankruptcy Court's finding that CDC was insolvent on October 1, 1981 and at all times thereafter is supported by the record and is not clearly erroneous.

Next, the appellants argue that the demand note given to Octopi on January 14, 1982 represented a contemporaneous exchange for new value under 11 U.S.C. §547(c)(1). McNeal states in his affidavit and deposition that he advanced an additional $7,000.00 to CDC at the time CDC executed the note. In his deposition, however, McNeal also stated that he could produce evidence substantiating his claimed advance. Despite ample opportunity, McNeal has failed to substantiate the $7,000.00 advance. Additionally, the Trustee avers that CDC's books and records do not reflect any such advance. Appellants have failed to raise a factual issue regarding the exception for contemporaneous exchanges for new value under 11 U.S.C. §547(c)(1).

The appellants lastly contend that the Trustee is estopped from asserting the preferential nature and resulting invalidity of the Octopi mortgage. The appellants argue that the Trustee recognized the mortgage on the Virginia Avenue property when he negotiated a credit towards CDC's indebtedness purportedly secured by that mortgage in exchange for the

quitclaim deed to the Westman Glen Apartments in April, 1983. The Trustee, however, first notes that he recognized the underlying indebtedness, not the mortgage, and secondly explains that he did not investigate liens on parcels of real estate until the parcels were being sold or abandoned. The Trustee was unaware of the circumstances behind the Octopi mortgage until McNeal offered to purchase the Virginia Avenue property in September 1983. Until that time, neither Octopi nor McNeal had attempted to enforce their lien or to collect any payments on the indebtedness of $110,000.00. As soon as the Trustee learned of the circumstances surrounding the Octopi mortgage, the Trustee's counsel notified McNeal's counsel of the Trustee's position.

The Seventh Circuit Court of Appeals recently set forth the requirements for establishing estoppel in *Walaschek & Associates, Inc. v. Crow*, 733 F.2d 51 (1984).

> Estoppel arises when one party's conduct leads another to believe that a right will not be enforced and causes the one so misled to act to his detriment in reliance upon his belief.

*Id.* at 54.

The Trustee did not engage in any conduct which would lead the appellants to believe that the validity of the Octopi mortgage would not be challenged. The appellants themselves took no action to enforce their lien until September, 1983 when the Trustee promptly challenged the mortgage as a preference. The appellants have failed to raise a cognizable claim of estoppel.

The Trustee, as cross-appellant, also challenges the Bankruptcy Court's decision. The Trustee contends that the $50,000.00 payment made to McNeal on November 13, 1981 by CDC was a preference and was not made in the ordinary course of business under 11 U.S.C. §547(c)(2). The Trustee asserts that the $150,000.00 loan was obtained by CDC to ease its cash flow difficulties and was not made in the ordinary course of business. Thus, the Trustee argues, the $50,000.00 payment on that loan was also not made in the ordinary course of business.

The record shows that the loan was made on October 23, 1981, more than 90 days before the bankruptcy petition was filed; that Griffin, on behalf of CDC, did not previously know Hendrickson; that a due date was established and a surety was required. The record also shows that Griffin had previously done business with McNeal and that CDC's business of buying and selling real estate involved occasional loans of large sums.

The loan was obtained due to certain cash flow difficulties experienced by CDC but the loan was made in anticipation of CDC reestablishing normal business following extended litigation in state court and the sale of the Westman Glen Apartments. The record fails to indicate that the loan was related to any prebankruptcy planning. The partial payment of $50,000.00 was made prior to the due date of the note. The Bankruptcy Court's determination that the $50,000.00 payment was made in the ordinary course of business is supported by the record.

For the foregoing reasons, the factual findings of the Bankruptcy Court are supported by the record and are not clearly erroneous and this Court finds no error in the Bankruptcy Court's application of the law to those facts. Accordingly, the decision of the Bankruptcy Court will be affirmed.

Dated this 26th day of June, 1985.

/S/ S. HUGH DILLIN

S. Hugh Dillin, Judge

Copies to:
Seymour M. Bagal, 7618 North Lockwood Ridge Road, Sarasota, Florida, 33580

Eric M. Cavanaugh, 1135 Market Square Center, 151 North Delaware Street, Indianapolis, Indiana, 46204

IN THE

# United States Court of Appeals

## For the Seventh Circuit

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Nos. 85-2298 (appeal) and 85-2308 (cross-appeal)

IN RE: COLONIAL DISCOUNT CORPORATION,

*Debtor,*

JAMES C. COURTNEY, Trustee,

*Plaintiff-Appellee and Cross-Appellant,*

*v.*

OCTOPI, INC. and JOE MCNEAL,

*Defendants-Appellants and Cross-Appellees.*

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Appeal and Cross-Appeal from the United States District Court for the Southern District of Indiana.
No. 85-C-447—**S. Hugh Dillin**, *Judge*.

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ARGUED FEBRUARY 18, 1986—DECIDED DECEMBER 5, 1986

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Before COFFEY and RIPPLE, *Circuit Judges*, and WILL, *Senior District Judge.**

WILL, *Senior District Judge.* Colonial Discount Corporation ("CDC"), the debtor in this bankruptcy action, filed for reorganization under chapter eleven of the Bankruptcy

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* The Honorable Hubert L. Will, Senior District Judge for the Northern District of Illinois, is sitting by designation.

Code. In the bankruptcy court, the trustee argued that certain transactions between CDC and appellants/cross-appellees Joe McNeal and Octopi, Inc. constituted avoidable preferences under 11 U.S.C. § 547 (1982 & Supp. II). On the trustee's motion for summary judgment, the bankruptcy court ruled that some of the transactions were preferential and that others were not. The district court affirmed. On appeal, both sides challenge the lower court's conclusions. We affirm in part and reverse in part.

I.

Prior to filing its chapter eleven petition, CDC was engaged in the business of buying and selling real estate. On October 23, 1981, CDC borrowed $150,000 from a lender known as Silvertown, Inc. In return, CDC gave Silvertown a promissory note and a mortgage on property located at 40-42 Virginia Avenue ("Virginia Avenue property"). The mortgage was never recorded. In exchange for Joe McNeal's agreement to act as surety on the loan, Silvertown assigned the promissory note and mortgage to him.

On November 13, 1981, CDC made a payment of $50,000 on the loan to McNeal, who in turn forwarded it to Silvertown. At this time, the due date of the note was extended from November 15, 1981 to December 7, 1981. When December 7 arrived, CDC failed to make payment and McNeal as surety paid Silvertown the balance of $102,560.

On January 13, 1982, McNeal incorporated Octopi, Inc. with himself as its president and sole shareholder. The same day, CDC executed a new note ("Octopi note"), evidencing its agreement to pay Octopi $110,000. In his affidavit and deposition, McNeal stated that the $110,000 figure represented the unpaid principal and interest on the original loan plus an additional cash advancement of "approximately $7,000" from McNeal to CDC. The trustee in his affidavit stated that the books and records

of CDC contained no documentation of any cash advancement.

To secure the Octopi note, CDC granted mortgages to Octopi on the Virginia Avenue property and on real estate known as the Westman Glen Apartments in Hamilton County, Indiana ("Octopi mortgage"). Both mortgages were recorded on January 14, 1982.

CDC filed for bankruptcy on February 4, 1982. Its estate consisted of hundreds of separate real estate parcels, including the properties subject to the Octopi mortgage. After an auction at which the highest bid was rejected, the trustee abandoned the Westman Glen Apartments property to the senior mortgage holder, who then proceeded to foreclose on the property. On April 7, 1983, McNeal approached the trustee about obtaining a quitclaim deed for the apartments property. The trustee agreed to quitclaim his interest in the apartments property in exchange for $10,000 cash and a $25,000 credit on CDC's debt under the Octopi note and the mortgage on the Virginia Avenue property.

In September, 1983, McNeal offered to purchase the Virginia Avenue property from the trustee. Upon investigating the mortgages on the property, the trustee learned for the first time of the original loan from Silvertown to CDC and the subsequent transactions by which Octopi was substituted as obligee. The trustee promptly advised McNeal of his position that the Octopi mortgage on the Virginia Avenue property and the November 13, 1981 payment of $50,000 to McNeal on the original debt were preferential transfers. Subsequently, the trustee commenced this action.

In the bankruptcy court, the trustee moved for summary judgment, arguing that on the uncontradicted record the Octopi mortgage on the Virginia Avenue property and the $50,000 payment must be set aside as preferences. The bankruptcy court agreed with the trustee as to the Virginia Avenue mortgage, but disagreed as to the $50,000

payment. On appeal to the district court, the bankruptcy court's conclusions were affirmed.[1]

II.

Rule 56 of the Federal Rules of Civil Procedure, which applies in bankruptcy proceedings by virtue of Rule 7056 of the Bankruptcy Rules, provides that summary judgment will be granted if there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. Pro. 56(c). On appeal, we apply the same standard, for the existence of a genuine issue of material fact is a legal determination subject to *de novo* review. *See, e.g., In re Brass Kettle Restaurant*, 790 F.2d 574 (7th Cir. 1986).

The courts below found that there was no genuine issue as to each of the following material facts: (1) that CDC was insolvent when it granted the Octopi mortgage; (2) that McNeal gave no new consideration for the Octopi mortgage; (3) that the trustee was not estopped from asserting the invalidity of the Octopi mortgage; and (4) that the original $150,000 loan and $50,000 payment on the loan were made in the ordinary course of business of CDC and McNeal. After briefly discussing the relevant provisions of the Bankruptcy Code, we consider each of these issues in turn.

Section 547 of the Code sets forth the rules governing avoidability of preferential transfers. Under subsection (b), the trustee may avoid any transfer of property of the debtor that is:

[1] Though in its judgment order the bankruptcy court stated simply that it was granting summary judgment for the trustee on the question of whether the Octopi mortgage was preferential, its opinion clearly holds that, as to the $50,000 payment, McNeal and Octopi had "sustained [their] burden of establishing an exception to avoidance." All parties and the district court treated the bankruptcy court's decision as a final decision granting summary judgment in part for the trustee and in part for McNeal. Because we find this treatment to be appropriate in light of the record, our own jurisdiction is established.

(1) to or for the benefit of a creditor;
(2) for or on account of an antecedent debt owed by the debtor before such transfer was made;
(3) made while the debtor was insolvent;
(4) made—
(A) on or within 90 days before the date of the filing of the petition; or
(B) between ninety days and one year before the date of the filing of the petition if such creditor at the time of such transfer was an insider;
(5) that enable such creditor to receive more than such creditor would receive if—
(A) the case were a case under chapter 7 of this title;
(B) the transfer had not been made; and
(C) such creditor received payment of such debt to the extent provided by the provisions of this title.

11 U.S.C. § 547(b). Subsection (c), in turn, "excludes certain specified transfers from the trustee's preference avoiding power even though they literally fall within the definition of a preference contained in section 547(b)." 4 *Collier on Bankruptcy* ¶ 547.37 (15th ed. 1979). Under subsection (g), added to the Code by the amendments of July 10, 1984, Pub. L. 98-353, Title III, § 462(g), 98 Stat. 355, the trustee has the burden of proving avoidability under subsection (b), while the creditor has the burden of proving an exception to avoidability under subsection (c). 11 U.S.C. § 547(g). Subsection (f) creates a presumption that the debtor was insolvent during the ninety days immediately preceding the filing of the petition. 11 U.S.C. § 547(f).

A.

McNeal and Octopi contend that a genuine issue of material fact exists as to whether CDC was insolvent under section 547(b)(3) on the date of the Octopi mortgage. Recognizing that CDC granted the mortgage well within the ninety day period in which, under subsection

(f), they are presumed to be insolvent, the appellants maintain that they brought forth evidence sufficient to rebut the presumption. Specifically, they rely on CDC's financial report for the year ending September, 1980 and the two sets of balance sheets contained therein. The first set of balance sheets, which was prepared in accordance with generally accepted accounting principles, showed a positive net worth of $7,387. The second set used an experimental method of measuring "current value" and revealed a positive net worth of over five million dollars.

The evidence contained in the financial report is not sufficient to rebut the presumption of insolvency contained in section 547(f). First, although notes regarding litigation pending against CDC were appended to the report as late as September 1981, the report does not purport to reflect CDC's financial condition as of any date later than September, 1980.[2] The relevant period is in January, 1982, over a year later, when CDC made the Octopi mortgage. The fact that CDC's assets exceeded its liabilities by a mere $7,387 in September, 1980 does not tend to rebut

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[2] In the introduction section of the financial report, the independent auditors who examined it stated:

> As discussed in Note 23 of the Notes to Financial Statements, the Indiana Securities Commission filed a lawsuit against the Company on September 14, 1981. The lawsuit relates to the sale of investment notes by the Company and alleges that the notes are not adequately secured. The ultimate outcome of this litigation cannot be determined, and no provision has been made in the 1980 financial statements for any loss that may result.
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> * * *
>
> In our opinion, subject to the effects on the 1980 financial statements of the outcome of the uncertainty referred to in the second and third paragraphs, the consolidated financial statements referred to above presented on a historical cost basis present fairly the financial position of Colonial Discount Corporation and subsidiaries as of September 30, 1980 and 1979 . . . .

Financial Report, Exh. 1 to McNeal's Affidavit, at 1, 2.

the presumption that CDC was insolvent over a year later; if anything, it tends to support the presumption.

Second, the current-value balance sheets raise no genuine issue as to CDC's insolvency. As the independent auditors who examined the financial report noted, the current-value balance sheets "differ significantly from, and are not in accordance with, generally accepted accounting principles." Financial Report, Exh. 1 to McNeal's Affidavit, at 2. The auditors further observed:

> Because current-value accounting is presently in an experimental stage, uniform criteria for the preparation and presentation of current-value financial information has not yet been established and acceptable alternatives exist as to the nature and content; accordingly, as experimentation proceeds, the principles followed in the accompanying current-value financial statements may be modified.

Given these caveats, and the additional fact that again the current-value balance sheets reflect CDC's financial condition only as of September 1980, we think it clear that this evidence would not have been admissible at trial and is therefore not properly considered on a motion for summary judgment. *See* Fed. R. Civ. Pro. 56(e) (supporting materials "shall set forth such facts as would be admissible in evidence"). In any event, the current-value balance sheets raise no "genuine" issue, since no reasonable fact-finder could rest a verdict in favor of McNeal and Octopi on them. *See Anderson v. Liberty Lobby, Inc.*, 106 S.Ct. 2505 (1986).

McNeal testified at his deposition that he relied on the financial report when he agreed to act as surety on the original loan. Any reliance by McNeal is simply irrelevant. Section 547(b)(3) is concerned solely with an objective question: whether the debtor's liabilities exceeded its assets on the date of the transfer sought to be avoided. 11 U.S.C. § 101(29)(A) (defining insolvency); *see Barash v. Public Finance Corp.*, 658 F.2d 504, 510 (7th Cir. 1981) (legislative history of § 547 supports view that preferen-

tial nature of transaction is determined by objective criteria).

Finally, the trustee produced evidence of CDC's insolvency. In his affidavit, the trustee stated, based on his personal knowledge of CDC's books and records, that:

> The Debtor's financial condition did not significantly deteriorate between October 1, 1981 and the filing of the chapter 11 petition on February 4, 1982. The Debtor was insolvent on October 1, 1981 and at all times thereafter.

Often it is necessary to infer the fact of insolvency from other facts. *In re Claxton*, 32 B.R. 215, 218 (Bankr. E.D. Va. 1983). "When the date is near and no change in circumstances is shown, the Court may infer insolvency as of the relevant date." *Id.* (citing *In re Great Western Biscuit Co.*, 85 F. Supp. 314, 315 (S.D. Cal. 1949)). Indeed, on the undisputed record in this case, the lower courts drew the only permissible inference: that CDC was insolvent on October 1, 1981 and thereafter.

In sum, the lower courts correctly held that CDC was insolvent when the Octopi mortgage was made in January, 1982. As such, the trustee met his burden of proving the elements of section 547(b)(3).

B.

McNeal and Octopi next contend that the lower courts erred in concluding that McNeal had not made a cash advancement of approximately $7,000 to Octopi in connection with the Octopi note and mortgage. The appellants' theory is that the $7,000 payment brought them within the exception to avoidance set forth in 11 U.S.C. § 547(c)(1). This section provides that the trustee may not avoid a transfer:

> to the extent that such transfer was (A) intended by the debtor and the creditor to or for whose benefit such transfer was made to be a contemporaneous exchange for new value given to the debtor; and (B) in fact a substantially contemporaneous exchange.

11 U.S.C. § 547(c)(1).

The bankruptcy court simply ignored McNeal's testimony that part of the consideration for CDC's promise to pay $110,000 to Octopi was a contemporaneous exchange of approximately $7,000 in cash. The district court, while acknowledging the testimony, discounted it because McNeal never provided documentary evidence to substantiate it, even though he stated at his deposition that he could do so. In opposition to McNeal's testimony, the district court noted, the trustee observed that nothing in the books and records of CDC indicated that the cash had been received.

We agree with the appellants that the district court should not have resolved this dispute on motion for summary judgment. There is no burden on a party opposing summary judgment to supply documentary evidence in support of oral testimony that raises an issue of fact. Moreover, summary judgment is rarely an appropriate method of resolving credibility questions. *Stewart v. RCA Corp.*, 790 F.2d 624, 628 (7th Cir. 1986). In light of the fact that $7,000 is approximately the difference between the amount McNeal paid Silvertown on behalf of CDC ($102,560) and the $110,000 amount of the Octopi note, McNeal's testimony is not implausible on its face. Of course, there are alternative theories, such as interest, to explain the difference; the point is simply that McNeal's testimony raises a factual question on which differing conclusions could be drawn.

At the same time, nothing in McNeal's testimony contradicts the evidence that the remainder of the $110,000 amount was given in exchange for an "antecedent debt," 11 U.S.C. § 547(b)(1)—*i.e.*, McNeal's $102,560 payment to Silvertown—and was not "new value." 11 U.S.C. § 547(a)(2) (new value "does not include an obligation substituted for an existing obligation"). Since section 547(c)(1) specifically exempts a contemporaneous exchange only "to the extent that" it is for new value, the court on remand should reconsider the avoidability of the Octopi debts only to the extent of the alleged cash advancement.

C.

McNeal and Octopi argue that the trustee was estopped from denying the validity of the Octopi mortgage. In their view, when the trustee granted McNeal a quitclaim deed on the apartments property in exchange for a $25,000 credit on the debt secured by the Virginia Avenue property, the trustee implicitly recognized the validity of the Octopi mortgage.

We disagree. "Estoppel arises when one party's conduct leads another to believe that a right will not be enforced and causes the one so misled to act to his detriment in reliance upon his beliefs." *Walaschek & Associates v. Crow*, 733 F.2d 51, 54 (7th Cir. 1984). Nothing in the trustee's conduct could have led McNeal reasonably to believe that the trustee was acknowledging the validity of the mortgage on the Virginia Avenue property. At most, the trustee acknowledged the underlying debt owing from CDC to Octopi.

As the trustee stated in his affidavit, until McNeal approached him in September 1983 about purchasing the Virginia Avenue property, he had no occasion to investigate the validity of the mortgage on the property. As soon as he learned of the circumstances surrounding the Octopi mortgage, he notified McNeal of his position that the mortgage was avoidable in bankruptcy. If McNeal was seeking assurances prior to that time, such as in April 1983 when the negotiations for the $25,000 credit took place, he could have requested the trustee to investigate. McNeal never made any such request. In these circumstances, he had no reasonable basis for relying on the April 7, 1983 transaction as grounds for estoppel.

D.

On cross-appeal, the trustee challenges the lower courts' finding that the $150,000 loan and $50,000 payment pursuant thereto were made in the ordinary course of business of CDC and McNeal. This finding led to the conclu-

sion that the appellants had qualified for the exception to avoidance in 11 U.S.C. § 547(c)(2). Section 547(c)(2) provides that the trustee may not avoid transfers that are (1) in payment of a debt incurred in the ordinary course of business of both the debtor and the transferee; (2) made in the ordinary course of business of both the debtor and the transferee; and (3) made according to ordinary business terms.

In his brief, the trustee writes that "loans made on the eve of bankruptcy to relieve a debtor's cash flow problems can never be considered as being 'ordinary' for purposes of 11 U.S.C. § 547(c)(2)." We think this characterization of the loan puts too much emphasis on its timing. While it is true that CDC was insolvent at the time of the loan and its partial repayment, insolvency is but one of the requirements of section 547(b). Moreover, even when all the requirements of subsection (b) are satisfied, a creditor may still establish an exception to avoidance by making a proper showing under subsection (c). *See* 4 *Collier on Bankruptcy* ¶ 547.37 (15th ed. 1979).

The purpose of the ordinary course of business exception is to ensure that normal commercial transactions are not caught in the net of the trustee's avoidance powers. *See Barash v. Public Finance Corp.*, 658 F.2d 504, 510 (7th Cir. 1981). The obvious extra-"ordinary" transaction is one designed to give the transferee an advantage over other creditors in bankruptcy. Nothing in the record suggests that the Silvertown loan transaction was related in any way to pre-bankruptcy planning. The loan was originally made some 104 days prior to the bankruptcy filing date and the payment in question some 79 days prior thereto. Nor does it indicate any "unusual action by either the debtor or creditor" to collect or pay on the deal. *Barash*, 658 F.2d at 510, *quoting* H.R. Rep. No. 95-595, 95th Cong., 1st Sess. 373-74 (1977), *reprinted in* U.S. Code Cong. & Ad. News 6329 (1978); S. Rep. No. 95-989, 95th Cong., 2d Sess. 88 (1978), *reprinted in* U.S. Code Cong. & Ad. News 5874 (1978).

On the contrary, the record shows that for twenty years CDC was in the business of buying and selling real estate, and that its business regularly involved borrowing large sums of money. McNeal had previously done business with several people at CDC, including Jack Griffith, CDC's sole shareholder. The note was initially assigned a short due date and the partial repayment on the note was made shortly before it became due and in consideration of an extension of the due date, all normal business arrangements. In sum, the record supports the conclusion of the courts below that the October 23, 1981 note, as well as the due date extension to December 7, 1981 and the $50,000 payment on November 13, 1981, two days prior to the note's original November 15, 1981 maturity, in consideration of that extension, were all in the ordinary course of business of both the debtor and the transferee and were in ordinary business terms. Accordingly, the appellants met their burden of establishing an exception to avoidance under section 547 (c)(2).

III.

For the reasons stated above, the decision of the district court is affirmed in part, reversed in part, and remanded for further proceedings consistent with this opinion.

A true Copy:

Teste:

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*Clerk of the United States Court of Appeals for the Seventh Circuit*